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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 449.

NEWARK FIRE INSURANCE COMPANY,
Appellant,

vs.

STATE BOARD OF TAX APPEALS and THE CITY OF NEWARK,
Appellees.

REPLY BRIEF OF APPELLANT.

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Newark, N. J.
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Reply to Point I.

Appellee's contention under Point I that the taxation of intangibles by the state of the domicile of the owner is an inherently just exercise of the taxing power is rested upon the proposition that the state of the domicile confers economic advantages upon the taxpayer which bear a direct relation to the imposition of the tax burden (Appellee's Br. 15, 16, 24, 25). The premise underlying this proposition is simply that the state which predominantly confers

economic benefits upon the taxpayer with respect to his intangible property has the jurisdiction to tax.

Appellee's recognition of the soundness of this basic proposition serves to clarify the issue presented here, because it is the application of this proposition to the facts in our case that establishes jurisdiction to tax in the State of New York which predominantly confers the many benefits and advantages upon the appellant which were formerly conferred by New Jersey. By reason of the fact that appellant's commercial domicile and the business situs of the intangible personal property taxed is in New York, New Jersey no longer confers the benefits ordinarily conferred by the state of the domicile upon intangibles. Certainly, it cannot be disputed that the mere fact that New Jersey has given appellant corporate existence confers no greater benefits upon appellant with respect to its intangible property, which has acquired a business situs elsewhere, than those conferred with respect to its real property and tangible personal property situated outside the state. New Jersey has no jurisdiction to tax such real and tangible property and no good reason is apparent, and none is suggested by appellee, why it should have jurisdiction to tax intangibles in such circumstances.

The foregoing illustrates that jurisdiction to tax intangibles must be compounded from more substantial stuff than the mere fact of creating corporate existence. The necessary ingredients are economic advantages, and benefits conferred with relation to the property taxed, and these are supplied in our case by the State of New York. New York, it is therefore submitted, is the only state that has jurisdiction to tax. This is so because it is the only state which confers those benefits which support the exercise of

the taxing power. That is what is meant in the Court's opinion in *First Bank Stock Corporation v. Minnesota* quoted on page 24 of appellee's brief. The considerations referred to by the Court, set forth in italics by appellee (p. 24), support the taxation of intangibles by the state of domicile, but the Court was careful to qualify this general statement by saying: *"at least where they are not shown to have acquired a business situs elsewhere."*

Although appellee places great reliance on the inheritance tax cases, which give the state of the domicile exclusive jurisdiction to tax intangibles, it fails to point out the significant fact that in none of these cases was it shown that the intangibles had a business situs or had become identified with a commercial domicile different from that of the personal domicile of the decedent, and the Court in each case was careful to point out that it was not deciding that question. See *Farmers Loan & Trust Company* v. *Minnesota*, 280 U. S. 204, at 213 (1930); *First Bank Stock Corporation* v. *Minnesota*, 301 U. S. 234 at 241 (1937); *Texas* v. *Florida* (not yet officially reported; 83 L. ed. Adv. Ops. 549 (1939)).

The inheritance tax cases do not impugn the principle contended for by appellant. They serve only to illustrate what appellant concedes, that where it is not demonstrated that an intangible has acquired a business situs or has not become intimately connected with a commercial domicile distinct from the owner's personal domicile, the state of the domicile has jurisdiction to tax by virtue of the fiction *mobilia sequuntur personam*. In this connection in considering the inheritance tax cases, it is important again to note that as to tangible property, which affords a true analogy to ownership of intangibles, the cases now uni-

formly hold that only the state of the situs can impose transfer inheritance taxes. *Frick* v. *Pennsylvania*, 268 U. S. 473 (1925).

Appellee asserts that appellant corporation is within the "jurisdiction" of the state of its incorporation in the sense of "inherent power" to tax intangibles (Br. 24). To refute this argument, it need only be noted that this is equally true of a corporation owning real and tangible property outside of the state. It could not be contended that inherent power over such a corporation gives the right to tax such property. The fallacy in appellee's entire argument springs from confusing conflict of laws jurisdiction to tax with actual constitutional jurisdiction to tax. A sovereign power, having an individual within its territorial limits, might exact taxes from him on land he owns which is located in another state. Having physical control of his person the sovereignty would there have "inherent power" over the person to impose a tax. The Constitution, however, imposes limitations upon the state's power to tax which it would otherwise have within the principles of conflict of laws jurisdiction (see 1 *Beale, Conflict of Laws* (1935), p. 518), and a state may not rely merely upon its "inherent power" over the person to sustain the exercise of the taxing power.

The City also contends that this inherent jurisdiction is not destroyed by virtue of the fact that the owner voluntarily submits himself to taxation elsewhere (Br. 25). Passing aside the fact already pointed out that "inherent power" is not constitutional jurisdiction to tax, it is a sufficient answer to this argument to direct attention to the numerous cases where persons by moving their tangible property, or by changing their domicile, relieve themselves

of taxation in one state and voluntarily subject themselves to taxation in another.

The principle that an owner of property may voluntarily remove from one state and subject his property to the jurisdiction of another state finds approval in the decision of this Court in *Southern Pacific Co.* v. *Commonwealth of Kentucky*, 227 U. S. 63 (1911), where the Court said (p. 67):

> "Since, therefore, an artificial situs for purposes of taxation is not acquired by enrollment nor by the marking of a name upon the stern, the taxable situs must be that of the domicile of the owner, since that is the situs assigned to tangibles where an actual situs has not been acquired elsewhere. The ancient maxim which assigns to tangibles, as well as intangibles, the situs of the owner for purposes of taxation has its foundation in the protection which the owner receives from the government of his residence, and the exception of the principle is based upon the theory that if the owner, by his own act, gives to such property a permanent location elsewhere, the situs of the domicile must yield to the actual situs and resultant dominion of another government."

The claim is also made by the City that no constitutional limitation may be imposed upon the taxing power of the state of the owner's domicile, except upon the principle of providing relief against a present double taxation (Br. 25). This argument begs the entire question for the basic principle here, as has been demonstrated in appellant's main brief (pp. 43-45), is one of jurisdiction to tax and not double taxation. Furthermore, this argument rests upon a palpable misconception of the basis of the fiction *mobilia sequuntur personam* and the doctrine of business situs and

calmly ignores the basic principle that jurisdiction to tax is based upon benefits conferred, which appellee recognizes elsewhere in its brief (pp. 15, 16, 24, 25).

The maxim *mobilia sequuntur personam*, recognizes that personal property, both tangible and intangible, is given protection and derives benefits within the jurisdiction of some sovereign state, upon which that sovereign can impose taxes. It presumes that this protection and these benefits are afforded by the state of the domicile of the owner in the absence of proof that the property sought to be taxed is permanently located in another jurisdiction. This presumption is based upon the underlying assumption that ordinarily an owner uses and employs his property in the state in which he resides. But when it is demonstrated that tangible personal property is located permanently in a jurisdiction other than the owner's domicile, it is uniformly held that it is no longer taxable by the state of the domicile. The reason for this is simply that it can no longer be presumed to be in a jurisdiction other than where it is conclusively established to be.

The doctrine of business situs merely recognizes what has for many years been recognized with respect to tangible personal property, that an owner may so use and employ his intangible personal property in a jurisdiction other than that in which he resides, that it there obtains the economic advantages realized through the protection and enjoyment of the rights of ownership; that it there becomes integrated in the body of the wealth of the state; that, in a word, it there acquires a "situs" for purposes of taxation under the basic principle already referred to under this point that the jurisdiction to tax rests upon benefits conferred.

Where such a state of facts is shown to exist, as it has been shown in this case, the assumptions supporting the fiction *mobilia sequuntur personam* fall; and with them, it is submitted, falls the fiction.

There is nothing new, unusual or illogical in the conception of business situs for intangible property, as has been demonstrated in the cases set forth at length in our main brief (pp. 15-39). Throughout appellee's entire brief and more particularly under this point, however, the assertion is made that the fiction of *mobilia sequuntur personam* is a well tested doctrine that should not be abandoned in favor of "the comparatively untried fiction of business situs". If appellee means to suggest that the doctrine of "business situs" confers an actual physical situs upon intangibles, we must admit that we would be dealing with a fiction, but appellant has demonstrated here and in its main brief that the term is used to describe not a physical situs but a very real state of facts which will, when present, establish jurisdiction to tax intangibles. In this, its true and proper sense, there is nothing fictitious or unreal in the doctrine. It is a very real thing. Considering the long and steady development of the law of business situs, and the equally long and steady modification and rejection of the fiction of *mobilia sequuntur personam,* it is strange indeed that appellee should purport to be surprised by appellant's suggestion that the fiction should here yield to the realities of "business situs".

The only proper inquiry is whether or not New Jersey any longer has any reasonable basis for jurisdiction to tax. The reasonableness of that basis is not changed by reason of the fact that New York does not tax the property. The law with respect to the taxation of real and tangible prop-

erty once again affords ready analogy. New Jersey could not tax real estate or tangibles located in New York and owned by a New Jersey corporation merely because New York does not see fit to tax them."

Reply to Point II.

Here again appellee stresses the fact that the inheritance tax cases hold that only the state of the domicile may tax intangibles. Only two observations need to be added to what already has been said under Point I herein. Firstly, it is interesting to note that appellee here admits that the inheritance tax cases indicate that intangibles are entitled to the same immunity from double taxation that is afforded to tangibles (p. 26). Secondly, those inheritance tax cases dealing with real property and tangible property hold that only the state of the situs may tax, and indicate that in fixing an exclusive jurisdiction to tax intangibles which have acquired a business situs elsewhere the Court will hold that it is in the state of the business situs.

Reply to Point III.

Under this point appellee places great reliance upon the decision of this court in *Schuylkill Trust Company* v. *Pennsylvania*, 303 U. S. 506 (1938). In this case it was held that the State of Pennsylvania could levy a property tax upon the owner of stock issued by a Pennsylvania trust company, doing business in that state, even though the owner was not resident in the state. Jurisdiction to tax was upheld on the theory that Pennsylvania, as the domicile of the issuing corporation, preserved and protected the property of the corporation, permitted it to carry on its

corporate functions there, and therefore gave value to the stock. On the issue presented here, the Court's only remark was:

> "The property right so represented is of value, arises where the corporation has its home, and is therefore within the jurisdiction of that state; and *this, notwithstanding the ownership of the stock may also be a taxable subject in another state.*" (Italics ours.)

This language does not give *carte blanche* to other states to impose taxes on the ownership of this type of property. At most, it does not deny that the ownership of the stock in question "may" be taxable in another state. The ownership "may" be taxable in another state, it is submitted, only if the owner is substantially benefited under the laws of that state.

In considering this case it is necessary to keep in mind certain fundamental differences between tangible property and intangible property, although both are taxed under statutes taxing the "property" as such.

In the case of tangibles, since they have physical qualities, there is no difficulty in determining where the property is. By its very nature, a tangible can be in but one place and at that place—its actual situs—the rights of ownership are exercised and value is given to the tangible, through its use, protection and preservation.

Intangible property, however, unlike tangible property, is not a thing which may be seen or touched. It is a chose in action and has no physical qualities, therefore it can have no actual situs, and, unlike tangible property, we may not say that, as property, it is in one place, and one place

only. *New York ex rel. Whitney* v. *Graves*, 299 U. S. 366 at 372 (1937).

Basically, and in reality, an intangible is a thing of two parts, since it is a relation between two persons, and it may be said that it is in two places.

First, one part, which may be termed the "ownership part", is the part which the owner uses and enjoys in a manner similar to tangible property. A share of stock is "property" to its owner because he uses it in his business, and it there adds to his wealth, produces income, is sold, pledged, or transferred by him as a thing of value. Next, the second part, which may be termed the "value part", is that which actually gives value to the intangible. In the case of stock, it derives its value from the fact that the issuing corporation is permitted to own property and carry on business. The property tax in the *Schuylkill* case was sustained on this ground—that the taxing jurisdiction benefited and preserved the "value part" of the stock.

However, only the ownership part of intangibles is involved in the instant case. Taxes levied by the state of domicile of the owner of an intangible and by the state of the "business situs" of an intangible are based upon the same basic theory that the ownership part of the intangible is protected and benefited. Jurisdiction is claimed because the owner is permitted to enjoy and use the intangible and not because the underlying value of the intangible is protected.

It is with reference to the ownership part of intangibles, with the conflicting claims of the state of domicile and the state of business situs, that we find a complete analogy to the taxation of tangibles, with the conflicting claims of the state of domicile of the owner and the state of actual situs.

Just as the owner of a tangible can use it only where it is situated, so the owner of an intangible can use and enjoy it only in one jurisdiction and can only obtain the protection and derive economic advantages from one jurisdiction at one time. If an intangible is so used that it acquires a business situs apart from the domicile of its owner, it is in a real sense enjoyed, protected and "situated" only there, just as a tangible which has acquired a situs apart from the domicile of its owner is used, protected and situated only there. In such a case it is as unreasonable to permit the domicile of the owner of the intangible to tax as it is to permit the domicile of the owner of the tangible to tax.

Looking at intangibles in this light, and it is submitted that for purposes of taxation it is the only proper light in which to view them, there is nothing in the decision in the *Schuylkill* case which in any way conflicts with the principle contended for by appellant here. The fact that both the value part and the ownership part give reasonable bases for a property tax does not support the conclusion that the ownership part may be taxed twice by different jurisdictions. The ownership part of an intangible can be subject to the tax jurisdiction of only one state at any one time. In the normal case that jurisdiction is the domicile of the owner since the ownership part is "situated" and used there. Where, as here, it has acquired a "business situs", it is "situated" and used apart from the domicile of the owner. In such a case the application of the fiction *mobilia sequuntur personam* must yield to reality, in the same manner that the fiction yields to reality when a tangible has acquired a permanent situs away from the owner's domicile. It is unreasonable to hold that the "property"

is "situated" at the domicile of the owner when all the rights of ownership are enjoyed and protected elsewhere.

While the decisions of this Court do not in terms define an intangible in the manner just suggested, it is submitted that this conception of an intangible is sound and affords the true basis of the decisions of this Court in the *Schuylkill* case and *First Bank Stock Corporation* v. *State of Minnesota*, 301 U. S. 234, and *Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193.

Under this conception of an intangible it is apparent that only one state can confer those advantages upon the ownership part necessary to support jurisdiction to tax and the fact that some other state may confer similar benefits upon the value part of an intangible is wholly beside the issue presented here. For the reasons mentioned, it is submitted that New Jersey has no jurisdiction to tax and that jurisdiction rests exclusively in the State of New York.

Reply to Point IV.

Under Point IV an effort is made to make this Court believe that appellant is attempting to distort the principle of business situs to escape taxation completely.

No basis exists for this assertion. Appellant pays taxes in the State of New York, (R. 20) and it is clearly subject to the taxing power of that state. Merely because New York, in exchange for the many benefits it bestows upon appellant, does not exercise its admitted right to tax the appellant's intangible property cannot affect the result here. New York is obviously satisfied that appellant is bearing its just share of the cost of running the government of that state. The fact that New York imposes less taxes than

some other state that conferred equal benefits might impose cannot give New Jersey jurisdiction to tax. The public policy of New York may be such that it feels that appellant's presence there and the employment of its intangibles there gives New York benefits in such a variety of ways that it has no occasion to impose a property tax on its intangibles. One may not agree with such a policy, one may feel that such a policy is unsound, but no one can deny the right of the sovereign state of New York to adopt such a policy, and we think it can be safely assumed that New York would not pursue that policy unless it was economically beneficial for it to do so. At any event it is no concern of New Jersey and affords no basis for assumption of jurisdiction by New Jersey.

The reasonableness of the doctrine that the state of the commercial domicile of a corporation or the state of the business situs of a corporation's intangibles has jurisdiction to tax such intangibles is self-evident. It merely recognizes that it is in that state that the corporation and its property there employed secures the protection and obtains the benefits which were formerly obtained at the technical domicile.

Furthermore, appellant is not immune from taxation in New Jersey. New Jersey may, if it so chooses, impose a franchise tax upon appellant. In the light of these considerations it is submitted that appellee's argument cannot be considered seriously.

Reply to Point V.

Under Point V it is contended that intangibles acquire a business situs for taxation only when (1) they are essential and integral parts of a business conducted in the foreign

state, (2) they are definitely subjected to taxation by the laws of a foreign state, and (3) they have been correctly determined by the authorities of the foreign state to have a "business situs" within such state. (pp. 35-37)

How the authorities in the foreign state can "correctly determine" that a corporation has a "business situs", when a prerequisite of a business situs includes the fact of such determination, presents an interesting problem for speculation. The appellee is frankly unable to solve this problem. It is a sufficient answer to this argument to say that the suggested definition of "business situs" finds no support in reason or authority.

Whether or not a "business situs" exists is a question of fact. Where is the main office of the company located? Where are its general corporate books kept? Where are its executive officers located? Where are its general accounts kept? Where are its cash and securities kept? Where are the general affairs of the company conducted? In the case of an insurance company, where are its general accounting and underwriting offices located? The answers to these questions determine the existence of a business situs. In our case the answer to all these questions is indisputably the State of New York. These facts are in the record in this case (R. 14-16). They are the facts upon which the finding of the State Court is predicated. They are the reasons why the State Court said:

> "This question must, in light of the proofs, be considered upon the inescapable premise that prosecutor had its business *situs* as of October 1st, 1934, and still has it, in New York; that the securities, the personalty involved, have become an integral part of its business *situs* in New York; but that pros-

ecutor pays no personal property tax to the State of New York" (R., p. 19).

The facts disclosed by the record are more than sufficient to support the State Court's finding that the business situs of the intangibles here taxed was in New York and not in New Jersey. They demonstrate that the intangibles of appellant have become identified with the conduct of appellant's business in the State of New York and have there become localized, and that the intangible wealth of appellant has become integrated in the body of the wealth of the State of New York.

It seems strange that appellee should now for the first time question the fact that the appellant's commercial domicile and business situs is located in New York, when it never questioned it in the courts below. It is no answer to say, as appellee does (Br., pp. 3, 4), that the findings of fact of the State Court, lightly referred to by appellee as a "premise", could hardly be challenged on appeal. Certainly, the "premise" could not be challenged on appeal because the "premise" was an inescapable conclusion from the proof in the case which appellee by stipulation agreed to. No one can be so naive as to suppose that appellee would have stipulated the facts without first having determined that they were in fact true.

In the light of the proofs in this case, it is submitted that it is "inescapable" that appellant's commercial domicile and the business situs of appellant's intangibles is in New York. The doubt as to this, which appellee now for the first time expresses, can hardly be considered real.

As has been pointed out in appellant's main brief, the facts in our case are closely analogous to the facts referred to by this Court in *Wheeling Steel Corporation* v. *Fox*, 298

U. S. 193, as being sufficient to establish business situs in West Virginia. The finding of the New Jersey courts that the business situs of the intangibles is in New York is clearly supported by the agreed facts in the case, and appellee's assertion (p. 35) that there is no adequate proof that they are essential and integral parts of the business conducted in New York is utterly without foundation.

Reply to Point VI.

Appellee's contention (p. 38) that "commercial domicile" is the same as "place of doing business" is likewise without support in reason or authority. The cases referred to in appellant's main brief demonstrate that "commercial domicile" is the place where a corporation predominantly exists and functions; where it predominantly carries on its business (main brief, pp. 39-43). In addition to the cases referred to therein, the following cases support appellant's contention.

In *State* v. *Tennessee Coal, Iron & R. Co.*, 188 Ala. 514 (Sup. Ct., 1914), the Court said (p. 521):

> "* * * this corporation, in so far as its business in Alabama is concerned, has established a permanent habitation in this state and that it is now, by virtue of that habitation and the act which was placed upon our books for its special benefit, enjoying rights and privileges in this state which pertain to none of our private citizens, and which but few of our own domestic corporations can, under our general laws, enjoy. The above act, when read in connection with the complaint and the assessment, clearly shows that while, by virtue of its birth in the state of Tennessee, this corporation may owe allegiance to the state of Tennessee, it is in reality

a denizen of Alabama, and, in so far as the property which is involved in this assessment is concerned, must rely, and is, under our law, entitled to rely, for protection, upon the laws of this state. In modern times, particularly in our states, corporations are not unaccustomed to organize themselves under the laws of one state for the sole purpose of doing business in some other state. It not infrequently occurs that a company which is organized for the sole purpose of supplying some particular city with water or with electricity or with some other public necessity claims citizenship in some state distant from that in which it does its sole business simply because it organized itself into a corporation there. The actual business of such a corporation may be, and frequently is, confined exclusively to some locality in one state, while, pro forma, its citizenship is in some other state. In all such cases the law, when it comes to matters of taxation, must throw aside the draperies with which such a corporation is clothed, and ascertain the situs (the actual place) of its property, and then accord to the state, which in reality has the business of such a corporation within its care, that right of taxation which belongs to the state as a return for its actual protection.

* * *

It has, however, taken up a home with our people. It has established general offices in our state, and we think it plain from this record that, in so far as its business in Alabama is concerned, that business is as distinct from its business in Tennessee (if it has business in that state) as if it were in fact a corporation entirely distinct from the Tennessee corporation.

* * *

In our opinion the record in this case shows that the situs of the solvent credits made the subject of

this assessment is the state of Alabama, and that they are liable to an ad valorem tax in this state.

* * *

While the legal residence of appellee may be in Tennessee, it has actually domiciled itself with us, and, on the face of the papers in this record, read in connection with the above act under which the appellee has been conducting operations in this state, we are of the opinion that the situs of the property sought, in this proceeding to be taxed, is the state of Alabama, and that this state has the right to impose an ad valoreum tax upon the same."

To the same effect is *Commonwealth, et al.* v. *United Cigarette Machinery Co.*, 119 Va. 447 (Sup. Ct. Appls., 1916), where the power of the State of Virginia to tax the intangible property of an English corporation was sustained. The decision in this case is based on the ground that the English corporation acquired a commercial domicile in Virginia, and so managed its property there that it was not subject to tax in respect thereto in England, its legal domicile.

The confusion which it is asserted might result from the adoption of the principle contended for by appellant is too readily assumed. There is no real basis for that assumption. There can be only one commercial domicile of a corporation and the suggested ten or fifteen commercial domiciles (p. 39) are based upon a misapprehension of the concept of commercial domicile. A corporation can have only one place where it predominantly exists and functions and where it predominantly conducts its general affairs. If it has fifteen offices carrying on various phases of its corporation functions, none of which really predominates, then

it has no commercial domicile but only its unchanged original domicile. Where it has no commercial domicile, the original domicile has jurisdiction to tax by virtue of the fiction *mobila sequuntur personam.* Nor is there any real difficulty in ascertaining where a corporation predominantly carries on its corporate affairs. This fact is no more difficult of determination than are many facts which the courts are daily finding.

Reply to Point VII.

While appellee asserts under Point VII that there is a serious conflict of authority among the state courts, the only authority it cites (pp. 41, 42) in conflict with the numerous ones referred to in appellant's brief is the decision of the Supreme Court of Michigan in *In re Truscon Steel Co.*, 246 Mich. 174. All that need be said about the decision of the Michigan court is to point out that it denies to the State of Michigan the power which this Court affirmed to West Virginia in *Wheeling Steel Corporation* v. *Fox.* If the Michigan courts refuse to permit the State of Michigan to impose a tax on the theory of business situs, there is nothing that can be done about it. Certainly, Michigan's refusal to recognize a power that this Court has recognized is no basis for asserting that appellant's intangibles are not within the taxing jurisdiction of the State of New York.

Under this point (p. 44 and elsewhere pp. 37 and 4) appellee places great reliance upon the claim that there is no possibility of double taxation in this case because the taxing statute under consideration here exempts personal property owned by a corporation of New Jersey "situate and being out of the state upon which taxes shall have been

actually assessed and paid within twelve months next before October 1st."

Upon this basis, it is argued that New Jersey has the constitutional power to tax property not elsewhere taxed. This argument is persuasive only if it is conceded that a state can acquire constitutional power to tax property by granting exemptions if it is elsewhere taxed. The fallacy of this argument is demonstrated by referring once again to tangible property. The statute does not give New Jersey the constitutional power to tax tangible property located in New York, and owned by a resident of New Jersey, upon which New York has not imposed a tax. The same considerations which deny to New Jersey the constitutional power to tax in the case of tangibles refuse a like power with respect to intangibles.

Furthermore, the statute does not have the effect claimed for it. Double taxation is possible under the statute. A case can readily be put where a resident of New Jersey would not or could not pay a tax imposed by the State of New York upon property located there by October 1, the taxing date in New Jersey. In that event New Jersey, under the foregoing statute, would have constitutional power to subject the property to a second tax here. It is hardly conceivable that one's constitutional rights can depend upon the uncertain fact of payment.

Reply to Point VIII.

The statute referred to under this point, which it is alleged appellant has violated, was first enacted in 1902 (P. L. 1902, p. 487). Appellant company was incorporated under a Special Act in 1811 and could not possibly have vio-

lated the provisions of the 1902 statute with respect to the contents of its corporate charter. The bald assertion that the appellant is subject to this provision of the later statute is unsupported by the citation of any authority. This lack of supporting authority is obviously due to the fact that the statute provides that the section in question applies only to persons forming corporations under its provisions.* It could not therefore apply to others.

Even if it be assumed that the provisions of the 1902 statute are applicable to appellant's charter, the practical construction placed upon the language referred to is to require companies formed thereunder to designate a "principal office" within the state and to permit the establishment of actual principal places of business elsewhere, where the general business of the company is conducted. This practice has existed for many years and the amendment to the statute (P. L. 1937, Ch. 164, p. 396) referred to on page 3 of appellee's brief, is merely a legislative recognition of the long established practice. This practical construction finds judicial support in this case. The contention made here was made by appellee in the New Jersey courts. The state courts apparently rejected the argument because no mention is made of it in the opinion of the Supreme Court, adopted by the Court of Errors and Appeals, and in the face of this contention the New Jersey courts found as a fact that the business situs of the appellant and the business situs of the property taxed was in the State of New York (R., p. 19).

If it be assumed further that there exists a violation of the statute in the respects claimed by appellee that fact could not affect the result here. The contention was rejected

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* See 2 Comp. Stat. of New Jersey (1910), secs. 1, 3, p. 2839; amended, Laws of 1929, c. 6, p. 18.

in the state courts and the fact is, as was found in the state courts, that appellant has kept and maintained its principal office and place of business in New York for a period of five years before the present tax was imposed. The New Jersey courts did not hold that the alleged violation of this statute permits personal property taxes to be imposed as a penalty. This Court should not do so, for the reason that the penalty for such a violation is not the imposition of taxes upon property which is not within the jurisdiction of the state, but the revocation of the company's charter by appropriate action in the New Jersey courts.

It is respectfully submitted that the judgment of the Court of Errors and Appeals of New Jersey should be reversed.

Respectfully submitted,

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On the brief:

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Newark, New Jersey, April 12, 1939.